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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 RONALD SORENSON,

11 Petitioner,

12 v.

13 MARGARET GILBERT,

14 Respondent.

CASE NO. 3:16-cv-05227-BHS-JRC

ORDER FOR SUPPLEMENTAL
BRIEFING

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16 The District Court has referred this petition for a writ of habeas corpus to United States
17 Magistrate Judge J. Richard Creatura. The Court's authority for the referral is 28 U.S.C. §
18 636(b)(1)(A) and (B), and local Magistrate Judge Rules MJR3 and MJR4. Petitioner filed the
19 petition pursuant to 28 U.S.C. § 2254.

20 Respondent has submitted an answer arguing that petitioner's habeas petition was filed
21 outside the one year statute of limitations and so is now time barred. Petitioner argues that he is
22 entitled to equitable tolling of the statute of limitations, and so the Court should consider
23 petitioner's habeas petition on its merits. Because the Court cannot determine whether petitioner
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1 is entitled to equitable tolling on the record before it, the Court directs the parties to submit
2 supplemental briefing.

3 **BACKGROUND**

4 In March of 2016, petitioner filed this petition for a writ of habeas corpus. Dkt. 1. The
5 Court stayed the case pending the outcome of petitioner's state personal restraint petition
6 ("PRP"), which was pending in state court when petitioner filed his habeas petition. Dkt. 10. On
7 October 10, 2018, after learning the Washington Supreme Court had terminated review of the
8 PRP, the Court lifted the stay on this case and provided respondent with time to enter her answer.
9 Dkt. 32.

10 In respondent's answer to petitioner's habeas petition, respondent argues that petitioner's
11 habeas petition was filed outside the one year statute of limitations under the Antiterrorism and
12 Effective Death Penalty Act ("AEDPA"). Dkt. 33. Respondent also argues that petitioner is not
13 entitled to statutory tolling for the time he spent exhausting his state court remedies because the
14 Washington Court of Appeals found that his PRP was not filed in a timely manner. *Id.*

15 Petitioner filed a motion for extension to file his reply and filed his reply after his petition
16 came ready for consideration. Dkt. 35. In petitioner's reply, petitioner argues that he should be
17 entitled to equitable tolling of the statute of limitations because his counsel representing him for
18 his PRP committed misconduct by filing the PRP late, an argument not addressed in
19 respondent's answer. Dkt. 36.

20 **DISCUSSION**

21 Petitioner appears to argue that he is entitled to equitable tolling because his attorney
22 filed his PRP late, thus precluding statutory tolling as to the federal statute of limitations and
23 consequently forcing petitioner to file his habeas petition after the one year statute of limitations
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1 had expired. *See* Dkt. 36. In some circumstances, an attorney’s misconduct in representing a
2 petitioner may be so egregious as to constitute extraordinary circumstances warranting equitable
3 tolling. *See Spitsyn v. Moore*, 345 F.3d 796, 801-02 (9th Cir. 2003) (finding that an attorney’s
4 failure to file a timely habeas petition was so egregious that it warranted equitable tolling
5 because counsel was retained almost a year before the petition was due, counsel had been paid to
6 file the prisoner’s habeas petition, the prisoner and his mother both urged counsel to file the
7 petition, counsel never filed the petition in question, and counsel failed to provide the prisoner
8 with access to his legal materials to file a pro se petition). However, the Ninth Circuit has also
9 held that “the miscalculation of the limitations period by [counsel] and his negligence in general
10 do not constitute extraordinary circumstances sufficient to warrant equitable tolling.” *Frye v.*
11 *Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001); *see also Miranda v. Castro*, 292 F.3d 1063, 1068
12 (9th Cir. 2002) (finding that counsel’s erroneous advice regarding the due date of a petition did
13 not constitute “extraordinary circumstances,” and reiterating that “‘miscalculation of the
14 limitations period . . . and [counsel’s] negligence in general do not constitute extraordinary
15 circumstances sufficient to warrant equitable tolling’”) (quoting *Frye*, 372 F.3d at 1146). Thus,
16 equitable tolling based on an attorney’s mishap is only available when “an attorney's failure to
17 take necessary steps to protect his client's interests is so egregious and atypical that the court may
18 deem equitable tolling appropriate.” *Ford v. Hubbard*, 330 F.3d 1086, 2206 (9th Cir. 2003),
19 *vacated on other grounds by Pliler v. Ford*, 542 U.S. 225 (2004). In contrast, “‘a garden variety
20 claim of excusable neglect,’ such as a simple ‘miscalculation’ that leads a lawyer to miss a filing
21 deadline, does not warrant equitable tolling.” *Holland v. Florida*, 560 U.S. 631, 651-52 (2010)
22 (internal citations omitted).

1 Here, petitioner argues that the reason his PRP was not filed in a timely manner, and thus
2 the only reason he is not entitled to statutory tolling, was because the attorney representing him
3 failed to file his PRP on time. Dkt. 36. Petitioner's counsel filed his PRP on September 15, 2015,
4 but the Washington Court of Appeals found his PRP untimely. Dkt. 34-2, pp. 58-61. Petitioner
5 has provided emails indicating that his attorney believed the PRP was due to be filed with the
6 state courts by September 16, 2015. Dkt. 36, p. 6. The emails also indicate that petitioner was
7 nervous his counsel would miss the deadline to file a PRP and was worried that his claims,
8 including claims raised in a federal habeas petition, would be jeopardized through no fault of his
9 own. *See, e.g.*, Dkt. 36, p. 11 (in an email to petitioner's mother: "ive read case law where the
10 attorney failed to meet the time line and the client didnt show that he was diligent in notifying his
11 council of the dead line so they timebared him and he had to do his whole sentence the
12 washington courts will do this if we dont show we are telling our council about the approaching
13 deadline") (spelling and grammatical errors in original); *id.* at p. 12 (indicating confusion as to
14 whether the statute of limitations would be tolled for petitioner's habeas petition based on his
15 PRP); *id.* at p. 16 (indicating that, as of September 26, 2015, petitioner was still not aware as to
16 whether his PRP had been filed by counsel); *id.* at p. 17 (indicating concern that petitioner's
17 counsel would not provide enough time after the conclusion of petitioner's PRP to timely file a
18 habeas petition).

19 Indeed, in counsel's briefing to the Washington Court of Appeals on petitioner's PRP,
20 petitioner's counsel argued that the one year statute of limitations to file a state collateral attack
21 began to run on September 16, 2014, the day after the state superior court entered an order
22 correcting a scrivener's error, rather than August 12, 2014 when the Washington Court of
23 Appeals entered its mandate. Dkt. 34-4, pp. 82-83. The Washington Court of Appeals disagreed,
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1 finding that petitioner had filed his PRP outside the one year statute of limitations because the
2 statute of limitations began running when the Washington Court of Appeals' mandate was
3 issued. *See* Dkt. 34-3, pp. 96-102. Thus, the statute of limitations had expired on August 12,
4 2015 – over a month before counsel filed petitioner's PRP. *Id.*

5 It is clear petitioner's attorney did not timely file petitioner's PRP and petitioner is
6 therefore not entitled to statutory tolling. *See Pace v. DiGulielmo*, 544 U.S. 408, 410 (2005)
7 (“When a postconviction petition is untimely under state law, that [is] the end of the matter for
8 purposes of § 2244(d)(2)”). However, on the record before the Court, the Court cannot determine
9 whether counsel's failure to timely file petitioner's PRP was “garden variety” negligence in that
10 it was a miscalculation as to the date that the PRP was due, or whether petitioner's submitted
11 evidence demonstrates that his counsel's actions constitute the “egregious” misconduct entitling
12 petitioner to equitable tolling. The Court concludes additional briefing is necessary to determine
13 whether petitioner is entitled to equitable tolling.

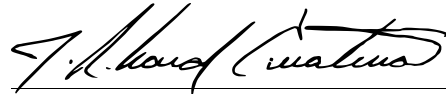
14 **DIRECTIONS TO THE PARTIES**

- 15 1) Petitioner's motion for extension (Dkt. 35) is granted. Petitioner's deadline to file his
16 reply is retroactively extended to December 19, 2018, the Court will consider it when
17 making a determination as to petitioner's habeas petition.
- 18 2) The parties are directed to file supplemental briefing addressing whether the failure of
19 petitioner's counsel to timely file his PRP constituted “garden variety” negligence
20 that does not entitle petitioner to equitable tolling, or constituted misconduct
21 sufficiently “egregious” to entitle petitioner to equitable tolling.
- 22 3) Respondent should file her supplemental briefing on or before February 8, 2019.

1 4) Petitioner may file supplemental briefing in response to respondent's supplemental
2 briefing on or before March 8, 2019.

3 5) The Clerk is directed to renote this petition for consideration beginning on March 8,
4 2019.

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6 Dated this 10th day of January, 2019.

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10 J. Richard Creatura
11 United States Magistrate Judge
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